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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. NOELL CHRISTINA SANCHEZ, Petitioner.	2 CA-CR 2007-0325-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20043671

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Sherick Law Office, P.C.
By Steven P. Sherick — Tucson

and

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By Michael L. Brown — Tucson
Attorneys for Petitioner

V Á S Q U E Z, Judge.

¶1 Pursuant to a plea agreement, petitioner Noell Sanchez was convicted of two counts of child abuse. The victim was her one-year-old son. Sanchez was sentenced in April 2006 to the presumptive prison term of ten years on the first count, amended count one of the indictment. On the remaining count, amended count five of the indictment, the court imposed a concurrent term of lifetime probation. Sanchez filed a motion for resentencing, which the trial court considered with the petition for post-conviction relief she filed pursuant to Rule 32, Ariz. R. Crim. P., raising a variety of claims, including ineffective assistance of counsel. In this petition for review, Sanchez contends the trial court abused its discretion by denying her requests for relief without an evidentiary hearing.

STANDARD OF REVIEW

¶2 Absent a clear abuse of discretion, we will not disturb a trial court's ruling on a request for post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). "'We review a trial court's factual findings for clear error.'" *Id., quoting State v. Herrera*, 183 Ariz. 642, 648, 905 P.2d 1377, 1383 (App. 1995). However, we review questions of law de novo, *State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005), and if a trial court commits an error of law, it has abused its discretion, *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006).

FACTS AND PROCEDURAL HISTORY

¶3 We view the facts in the light most favoable to sustaining the convictions. *State v. Schurz*, 176 Ariz. 46, 50, 859 P.2d 156, 160 (1993). Sanchez brought the victim to a hospital emergency room believing he had scabies and a reaction to medication she had

applied. But medical personnel determined the child had sustained second-degree immersion burns to both of his legs and notified police. The child also had other injuries, some old and others more recent, including fractures of both legs; bruising of his spleen, kidney, and other parts of his body; and cigarette and other burns on his wrist, stomach, and back. The victim was flown to a burn center and remained hospitalized for six weeks.[1]

¶4 Sanchez and her live-in boyfriend Salvador Rodriguez, who was a codefendant, were charged with seven counts of child abuse. The plea agreement Sanchez entered in February 2006 provided she would plead guilty to amended counts as follows: second-degree child abuse, domestic violence, a preparatory dangerous crime against children, "by intentionally or knowingly attempting to cause or permit the [victim] . . . to be injured, under circumstances likely to produce death or serious physical injury, to wit: second-degree burns on both legs," and child abuse, non-death or serious physical injury, domestic violence, "by intentionally or knowingly causing or permitting the [victim] . . . to be injured, to wit: the victim sustained a bruised spleen." The agreement provided the sentencing range on the first count was the minimum, mitigated, five-year term of imprisonment and the presumptive term of ten years. Probation was not available on that count but was on the second count, up to a lifetime term. The trial court accepted the plea after the change-of-plea hearing on February 17 and set the matter for sentencing.

[1]According to Sanchez, Child Protective Services took custody of her son and commenced a dependency proceeding in Pima County Superior Court. Ultimately, Sanchez consented to the appointment of her grandparents as the child's permanent guardians.

¶5 Sanchez submitted an extensive sentencing memorandum that included a seventeen-page letter defense counsel had sent separately to the probation officer and numerous attachments to that letter. At the sentencing hearing in April 2006, the trial judge acknowledged his chambers had received the sentencing memorandum the preceding afternoon, although he had been out of town until late that evening. He explained he had arrived at work before 6:00 on the morning of the hearing and had "looked through it, but . . . [had] not in any way, shape or form had an opportunity to truly read all of what was provided . . . ." The judge added that he was prepared to proceed but implied he would continue the sentencing if requested. Defense counsel stated he was "prepared to proceed" and proposed summarizing what was in the materials that he had sent to the judge. After the state recommended the ten-year prison term, defense counsel pointed out that he had not been provided with a letter from Child Protective Services (CPS) that the state had referred to in making its recommendation. Counsel then summarized the materials he had provided the court and urged it to impose the five-year, mitigated prison term on the first count and a fifteen-year term of probation on the second. Counsel noted various circumstances he argued were mitigating.

¶6 Before sentencing Sanchez, the court made the following comments:

> I think it's certainly not necessary and probably not even helpful for the Court to acknowledge the obvious, and that is that this is an extremely tragic and horrible and gut-wrenching case I'm
> sure for everyone involved.

> I am extremely confident that everyone in this room would do anything humanly possible and within their respective power to turn the clock back and avoid this horrific crime.
>
> Nevertheless, the matter comes to the court in the posture that it does, and the Court cannot look beyond the pain and disfigurement and the unknown emotional trauma visited upon this helpless victim.
>
> And that is predominant in the Court's analysis. I certainly acknowledge certain aggravating factors that are present in the case, and I acknowledge a number of mitigating factors that are clearly present and were eloquently outlined, Mr. Harwin, in your presentation as well as in the matters that you submitted to the Court.
>
> Nevertheless, in view of all of the facts before the Court and considering everything involved in the case, the Court does believe that the most appropriate sentence is the presumptive sentence and accordingly will order the presumptive sentence as to . . . Amended Count 1 of 10 years in the Department of Corrections.

The court also imposed the lifetime probationary term on amended count five, prohibiting Sanchez from having contact with the victim, but granting counsel leave to ask the court to reconsider the issue upon her release from prison.

¶7 The day after she was sentenced, Sanchez filed a motion entitled Motion for Disclosure of Materials Submitted by State Prior to Sentencing; and for Reconsideration of Sentencing Based Thereon; and Motion to Order Defendant Held at Pima County Jail until Such Disclosure is Made and Any Motions Based Thereon are Ruled Upon. Prompted by concern that the trial court had considered materials the state had submitted to the court but had not furnished to either Sanchez or her counsel, Sanchez requested in her motion that the state disclose all materials it had submitted to the court before sentencing, including any

materials that had been submitted by or that were related to CPS or the Arizona Department of Economic Security. A few weeks later, Sanchez filed another, separate motion to reconsider sentencing. She maintained there was abundant evidence she had been "systematic[ally] victimiz[ed] at the hand of the co-defendant" and insisted this was a mitigating circumstance under A.R.S. § 13-702(D)(3) that the trial court was required to consider. She argued the trial court "impermissibly failed to adequately consider the statutory mitigating factor notwithstanding its un-controverted support in the presentence report, and the plethora of evidence presented." She also asserted the court had failed to give adequate weight to the fact that she had been a minor participant in the abuse of her child as required by § 13-702(D)(4).

¶8 Sanchez then filed a motion seeking disclosure of the letter from the CPS caseworker. In July 2006, Sanchez filed a notice of post-conviction relief through different counsel. In March 2007, Sanchez filed a petition for post-conviction relief. In that petition, she incorporated and adopted the arguments she had raised in the motion for reconsideration and raised numerous additional claims that are summarized below.

¶9 Sanchez asserted trial counsel Michael Harwin had been ineffective in multiple respects. She alleged he had failed to investigate the victim's physical and emotional condition by observing the child or consulting his physician and psychologist to determine the extent of his injuries and the status of his recovery. This information, she argued, would have established the child had recovered completely, negating any finding that he had sustained serious physical injuries. In that regard, Sanchez maintained there was an

insufficient factual basis for her plea because the injuries could not be characterized as serious, that is, having caused permanent disability or permanent disfigurement. *See* A.R.S. §§ 13-105(34), 13-3623(A). She suggested Harwin had been ineffective because he had permitted the court to have the incorrect impression that the child had been seriously and permanently injured and thereby "failed to present a valid defense." And, she asserted, evidence to the contrary would have been a mitigating circumstance. Sanchez argued, too, that counsel should have objected to the state's argument that the victim's injuries were an aggravating factor under A.R.S. § 13-702(C)(1) and claimed the court had erred by relying on that factor because the infliction or threatened infliction of serious physical injury is an element of the offense, *see* § 13-3623(A); the court was precluded, she asserted, from relying on the seriousness of the injuries as an aggravating circumstance. *See* § 13-702(C)(1) (prohibiting court from finding infliction or threatened infliction of serious physical injury an aggravating circumstance if it is essential element of offense of conviction or relied upon to enhance range of sentence).

¶10 Sanchez also maintained Harwin had failed to investigate and introduce as mitigating evidence information relating to Sanchez's emotional fragility, the fact that she was systematically and severely abused and dominated by Rodriguez, and the fact that "she was emotionally and psychologically disabled from appreciating the danger and getting help for her and her son." Sanchez relied on a variety of reports as well as a transcript of an interview of Harwin. Believing Rodriguez had injured the victim, Harwin had had Sanchez evaluated by psychologist Richard Hinton. Sanchez maintained that, although Hinton had

prepared a "mitigation declaration report" in connection with the dependency proceeding, Harwin had failed to submit that report or any others at sentencing. Nor had he arranged for Hinton to give a mitigating statement or provide testimony for sentencing purposes. Sanchez added, "[T]he psychological evaluation of Ms. Sanchez, done after sentencing by Dr. Cheryl Karp, further demonstrates there existed significant mitigating information in Ms. Sanchez's background that the court never heard or considered." Sanchez maintained there was extensive evidence that she suffered from Battered Woman Syndrome, which, although not a defense, would have been a significant mitigating circumstance had the court known about it.

¶11 Additionally, Sanchez faulted Harwin for failing to discuss with her the fact that it was her burden to establish "mitigating factors and . . . that those mitigating factors outweighed any aggravating factors found by the court in order for her to be eligible for a sentence of less than ten years." She asserted Harwin had failed to present a number of statutory mitigating circumstances, including the following: Sanchez's young age; her diminished ability to appreciate the wrongfulness of her conduct because of her abuse by Rodriguez; the fact that she had been "under unusual and substantial duress"; and the fact that, although she had failed to protect the child, she had not been the one to inflict the injuries. *See* § 13-702(D)(1) through (D)(4). Sanchez also faulted Harwin for failing to request a continuance of the sentencing hearing once the judge conceded he had not had the opportunity to review all of the materials that Harwin had submitted. And, Sanchez maintained, Harwin had been confused and mistaken about precisely what the judge had

reviewed; had failed to review and object to the letter from the CPS case manager on the ground that, inter alia, it contained "multiple misstatements of fact, material inaccuracies, unsupported conclusions and otherwise biased[,] unfounded and subjective opinions"; and improperly had believed the probation officer would recommend a mitigated sentence and unjustifiably relied on that belief. Sanchez maintained she had been prejudiced by counsel's deficient performance, arguing the outcome of the case, specifically the sentence, would have been different but for counsel's deficiencies. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984) (to establish ineffective assistance of counsel, defendant must show counsel's performance was both deficient and prejudicial).

¶12 In a thorough and thoughtful minute entry, the trial court denied the relief requested in the motion for reconsideration and all pleadings and supporting documents submitted in connection with the Rule 32 proceeding, after clearly having considered all of the claims Sanchez had raised. The court addressed some of the numerous claims specifically and rejected others implicitly. In summary, the court rejected the claim that the victim had recovered from his injuries and that the court should have considered that as a mitigating circumstance warranting less than the presumptive term of imprisonment. The court also rejected Sanchez's claim that the victim had not sustained serious physical injury and the various claims related to that assertion. The court essentially found that, despite the court's not having had as much time as it would have liked to review the materials before it, counsel had summarized the contents of the materials and highlighted the salient points. And, after having had the opportunity to reconsider the propriety of the sentence with the

benefit of the materials and extensive arguments in numerous motions and the Rule 32 petition, the court concluded it would have imposed the presumptive term in any event. Additionally, the court rejected Sanchez's claim of ineffective assistance of counsel, finding Harwin's performance had been neither deficient nor prejudicial.

PETITION FOR REVIEW

¶13 In her petition for review, Sanchez contends the trial court abused its discretion by finding as a matter of law that the victim had sustained serious physical injuries and relying on that fact as an aggravating circumstance; by relying on the latter as an aggravating circumstance at all because it was an element of the offense; by considering the letter from the CPS caseworker; by giving inadequate weight to the mitigating circumstances; and by rejecting her claim of ineffective assistance of trial counsel and denying her other requests for relief without an evidentiary hearing. Sanchez also asserts the court erred in implicitly rejecting without directly addressing her claim that her sentences had been imposed in violation of the Victims' Bill of Rights. Although no purpose would be served by reiterating the court's order in its entirety, *see Swoopes*, 216 Ariz. 390, ¶ 47, 166 P.3d at 959, we point to the relevant portions of the court's order in addressing Sanchez's arguments on review.

¶14 At the outset, we reject her general contention that the trial court abused its discretion by failing to give adequate weight to certain circumstances she insists were

mitigating and justified a prison term shorter than ten years.[2] In denying post-conviction relief, the court cited an abundance of authority for its observation that, because it had imposed the presumptive term, it had not been required to state the bases for that sentence. The court was correct. *See, e.g.*, A.R.S. §§ 13-701(C), 13-702(A) and (B); *State v. Ovind*, 186 Ariz. 475, 478, 924 P.2d 479, 482 (App. 1996). Nevertheless, at the sentencing hearing the court had explained why it found the presumptive term appropriate. Although we can infer from the court's comments at sentencing which factors it likely found mitigating and aggravating, the court did not specify those factors at the sentencing hearing or in its minute entry, nor was it required to.[3]

¶15 The court also correctly stated in its order denying post-conviction relief that it was not required to find mitigating circumstances existed simply because evidence in mitigation had been presented. The court was only required to consider the relevant evidence before it. *See State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003); *see also State v. Fatty*, 150 Ariz. 587, 591-92, 724 P.2d 1256, 1260-61 (App. 1986). The court had made clear at the sentencing hearing, as it did again in denying post-conviction relief, that it had considered all of the relevant information. Ratifying the sentence it had

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[2]To the extent Sanchez is challenging the lifetime term of probation as well, we reject the arguments for the same reasons.

[3]In her petition for review, Sanchez asserts the fact that the child sustained serious physical injuries was the "only aggravating factor" the court considered. Although it appears to have been one of the factors, it is not entirely clear that it was the only one. The court stated it could not "look beyond the pain and disfigurement and the unknown emotional trauma visited upon this helpless victim," suggesting trauma to the victim may have been a separate aggravating circumstance.

imposed, the court stated, "Were the court to have given a sentence other than the presumptive sentence, it would have given something more than the presumptive, not less."

¶16 To the extent Sanchez is questioning the weight the court gave to the various sentencing factors, she is asking us to reweigh those factors. This we will not do. It is for the trial court to determine, in the exercise of its sentencing discretion, how much weight to give to evidence presented in aggravation or in mitigation. *See State v. Bocharski*, 200 Ariz. 50, ¶ 63, 22 P.3d 43, 55 (2001). We defer to the trial court's determination of how much weight to give to the various factors it considers. *See State v. Olmstead*, 213 Ariz. 534, ¶ 7, 145 P.3d 631, 632-33 (App. 2006).

¶17 Sanchez also contends the trial court abused its discretion by rejecting her claim that it had erred in finding the victim had sustained serious injuries and relying on that as an aggravating circumstance. Sanchez points to evidence that the child had recovered from his injuries, including photographs and a statement from the physician's assistant who first treated the child that the injuries did not appear to be life-threatening. She maintains the court acted as its own expert "in determining on the basis of a one sided consideration of limited facts that [the victim's] injuries constituted serious physical injuries."

¶18 Again, it is not entirely clear whether the court found the extent of the child's injuries constituted an aggravating circumstance under § 13-702(C)(1). Even assuming it did find the seriousness of the victim's injuries to be an aggravating circumstance, Sanchez did not object at sentencing, thereby waiving all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). She has established

neither. The sentencing factor only had to be supported by a preponderance of the evidence. *See* § 13-702(D)(6). *But see State v. Barraza*, 217 Ariz. 44, ¶ 21, 170 P.3d 293, 299 (App. 2007) (when defendant challenges sufficiency of evidence to support aggravating circumstance, inquiry is whether there is "reasonable evidence in the record" to substantiate it); *State v. Molina*, 211 Ariz. 130, n.6, 118 P.3d 1094, 1101 n.6 (App. 2005) (aggravating factors exempt from requirements of *Blakely v. Washington*, 542 U.S. 296 (2004), need only be supported by reasonable evidence in record). The court did not err as a matter of law to the extent it found the victim had sustained serious injuries for purposes of § 13-702(C)(1).

¶19 "'Serious physical injury' includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." § 13-105(34). The prosecutor noted at the sentencing hearing that one of the physicians who had treated the child described the injuries as "torture." The prosecutor pointed out that, to avoid amputation of the victim's limbs, doctors had had to make incisions in his legs to permit blood to flow to his feet. The prosecutor presented the court with pictures that were apparently vivid in their representation of the victim's burns. The child had also sustained injuries that appeared to have been older than the burns: fractures to his legs, bruising to essential organs, a ruptured eardrum, cigarette burns on his back and abdomen, and injuries to his wrists. Additionally, a Tucson Police Department detective had described the victim's injuries in great detail when he testified before the grand jury, stating that scarring might be expected, muscle could have been compromised, and amputation had been a possibility.

¶20 Denying relief, the trial court found the victim had been severely burned, his injuries had required "surgical intervention," he had been "required to endure skin-grafting procedures," and he had been "hospitalized and sedated for two weeks." The court wrote, "It can not be rationally disputed that such injuries caused serious physical injury and could have killed this child. . . . It strains any reasonable notion of credibility to argue that this child's injuries were not serious." The record supports these findings. That Sanchez presented evidence in her post-conviction petition establishing the child had subsequently recovered does not negate this finding. We see no error, much less fundamental, prejudicial error, nor can we say the court abused its discretion in finding the victim had suffered serious physical injury and therefore denying relief on the related claims of ineffective assistance of counsel.

¶21 On review, Sanchez reiterates her related claim that the trial court was precluded by § 13-702(C)(1) from considering the victim's serious physical injuries as an aggravating circumstance because they were an essential element of the offense under § 13-3623. She admits counsel did not object but contends he was ineffective for failing to do so. And, she complains, the trial "court refused to address or rule on this issue."

¶22 The court rejected this claim implicitly by denying Sanchez's request for post-conviction relief. Count one was based on the burns to the child's legs; the second count was based on his bruised spleen. Although the burns were a significant portion of what the court arguably found as an aggravating circumstance for purposes of imposing the presumptive term, the court referred to the child's injuries comprehensively, as if it were

considering the totality of the circumstances and the general abuse of the child and the pain he had endured; as we previously stated, it appears the court considered as a separate circumstance the emotional trauma he had suffered. And contrary to Sanchez's argument, serious physical injury is not an essential element of the offense under § 13-3623. Section 13-3623(A) provides, in relevant part, that a person commits child abuse if,

> [u]nder circumstances likely to produce death or serious physical injury, . . . [the] person . . . causes a child . . . to suffer physical injury or, having the care or custody of a child . . . causes or permits the person or health of the child . . . to be injured or who causes or permits a child . . . to be placed in a situation where the person or health of the child . . . is endangered . . . .

Although the statute provides that the offense must be committed under circumstances likely to produce death or physical injury, the resulting injury does not have to be serious.

¶23 Similarly, we reject Sanchez's contention that the court abused its discretion when it denied relief on Sanchez's claim that the court should have considered as a mitigating circumstance the fact that the victim purportedly had recovered from his injuries and the related claim of ineffective assistance of trial counsel. The trial court found:

> The child's recovery is not, and cannot, be attributable to any action taken by Petitioner, particularly since the Petitioner has not had custody of the child since his hospitalization. As such, the victim child's recovery is not a mitigating factor to Petitioner's crime of placing the child in a position in which he sustained injuries likely to cause serious physical injury or death.

The court added in a footnote that "[e]ven if the extent of the child's recovery were a legitimate mitigating factor, it would not have changed this Court's sentencing decision."

The court further found that Sanchez had "confuse[d] the separate, distinct, and independent concepts of serious injury and recovery. The statute does not provide for leniency to one who allows a child to suffer a serious injury, should that child experience a favorable recovery from such injury." None of these sound, well-supported findings constitutes an abuse of discretion.

¶24 Sanchez asserts that, at the very least, she raised a colorable claim that trial counsel had been ineffective, warranting an evidentiary hearing. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (defining colorable claim as one that, if taken as true, might have changed outcome of case); *see also State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988) (same). We disagree.

¶25 First, the trial court made clear it found counsel's performance had not been deficient. It found counsel had in fact been diligent and commendably competent in urging the court to sentence Sanchez to a mitigated term of imprisonment. Second, the court made equally clear that, even upon reconsideration of the sentence in light of Sanchez's arguments, it would not have sentenced her to anything less than the presumptive term. Indeed, as we previously noted, the court pointed out that, if it were not constrained by the plea agreement, which assured the sentence would be no more than the presumptive term, it might have sentenced Sanchez to a longer, aggravated term of imprisonment.

¶26 Thus, even assuming arguendo counsel had performed deficiently, Sanchez has not established she was prejudiced as a result. *Strickland*, 466 U.S. at 698-99. Specifically, the court found Harwin had more than adequately summarized at the sentencing hearing the

materials he had presented to the court the afternoon before; consequently, Sanchez was not prejudiced by Harwin's failure to insist the sentencing hearing be continued. The court also found that, even had it had the benefit of Hinton's and Karp's testimony that Sanchez presented in the Rule 32 petition, it would have made no difference; the court still would have sentenced Sanchez to the presumptive term. Similarly, the court stated it

> d[id] not consider a specific sentencing recommendation from anyone except counsel for the State, counsel for the Defense or the Defendant. Therefore, the information provided by the CPS worker or the potential lack of a specific recommendation by the Probation Officer was not prejudicial to the defendant in any way.

Based on the record before us, Sanchez has not persuaded us on review that the trial court abused its discretion by finding Harwin had not been ineffective.

¶27 Finally, Sanchez has not established the trial court abused its discretion by implicitly rejecting rather than directly considering her claim that the sentences had been imposed in violation of the Victims' Bill of Rights. *See* Ariz. Const. art. II, § 2.1; *see generally* A.R.S. §§ 13-4401 through 13-4437. First, Sanchez lacked standing to assert these rights. *See* § 13-4437 (victim or prosecutor at victim's request has standing to bring action to enforce Victims' Bill of Rights); *see also Romley v. Superior Court*, 184 Ariz. 409, 410, 909 P.2d 476, 477 (App. 1995). In any event, the court clearly considered all claims raised and rejected them, albeit summarily or implicitly, and Sanchez has failed to establish the court abused its discretion by not setting forth a detailed explanation for denying relief. Moreover, the claim that information the victim's guardians might have provided could have been helpful to Sanchez at sentencing lacks merit. Sanchez's

grandmother did address the court at sentencing. As the court correctly found, Sanchez did not establish what information the victim's guardians would have presented had they been given the opportunity or that such information likely would have changed the sentence.

¶28 We grant Sanchez's petition for review; however, for the reasons stated herein, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PHILIP G. ESPINOSA, Judge

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JOSEPH W. HOWARD, Judge